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A Brief History of Distinctions in Criminal Culpability

By PAUL H. ROBINSON*

In 1953 the Model Penal Code drafters presented what may be their most significant and enduring achievement, a thoughtful definition of distinct levels of culpability. Only one year earlier, in *Morissette v. United States*,¹ Justice Jackson had complained of "the variety, disparity, and confusion" of judicial definitions of "the requisite but elusive mental element" in crime.² As a result of their pioneering endeavor,³ the Model Penal Code drafters reduced nearly eighty miscellaneous culpability terms⁴ to five carefully defined levels. In descending order of culpability they are "purposely," "knowingly," "recklessly," "negligently," and faultlessly ("absolute liability").⁵ Each adjacent pair of these five culpability levels represents a distinction between culpable mental states; the four together are those considered most significant by the Model Penal Code drafters.

Since the drafting of the Model Penal Code, nearly three-fourths

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1. 342 U.S. 246 (1952).

2. *Id.* at 252. See generally Remington & Helstad, *The Mental Element in Crime—A Legislative Problem*, 1952 WIS. L. REV. 644.

3. There were no previous formulations of this nature. Recklessness previously had not been defined by statute, although the proposed Wisconsin code contained a limited definition where the risk created was of death or great bodily harm, as well as a definition of "high degree of negligence" in the same context. See 1953 WIS. LEGIS. SERV. 339.24. Several state codes contained a definition of negligence drawn from N.Y. PENAL LAW § 3 (McKinney 1909). See MODEL PENAL CODE § 2.02, Comment 5 (Tent. Draft No. 4, 1955).

4. REPORT OF THE SENATE COMMITTEE ON THE JUDICIARY TO ACCOMPANY S. 1437, S. REP. NO. 605, Part I, 95th Cong., 1st Sess. 55 (1977).

5. MODEL PENAL CODE § 2.02(2) (Proposed Official Draft, 1962). Absolute liability is authorized in limited instances. See MODEL PENAL CODE § 2.05 (Proposed Official Draft, 1962).

of the states have revised their criminal codes.⁶ Recognizing the value of the Code's culpability structure, approximately seventy percent of those states undertaking revisions have adopted an essentially identical system.⁷ Whether or not one criticizes the Code's definitions or distinctions,⁸ its beneficial and influential aspects cannot be denied: the system is a vast improvement over the previous disorder and its prevalence requires that it be accorded status as the predominant "American" system of culpability distinctions. No matter how unique and innovative the achievement, however, the Model Penal Code scheme is only the most recent advance in a continuous chain of doctrinal refinements which extends as far back as law and society. Many earlier developments no doubt were more significant in their own time.

This Article considers the transition from the early Anglo-Saxon scheme, which distinguished only wilful and accidental conduct, to the current five-tiered system. Historical evidence reveals some surprising patterns of change which offer insight into the nature of the development of criminal law and, more importantly, offer grounds for speculation concerning the future of distinctions in criminal culpability.⁹ In addition to these broader concerns, a review of the history of distinctions in criminal culpability sheds some light on specific substantive and historical issues already in dispute. Many of the distinctions noted are the source of considerable controversy. Some writers suggest that recklessness should be the boundary of criminal liability and that negligence and strict liability should be excluded.¹⁰ Others claim that negligence is an appropriate basis for liability but that strict liability should

6. [1979] AMERICAN LAW INSTITUTE ANN. REP. 21.

7. Of the states that have not adopted the Model Penal Code's culpability structure—Florida, Georgia, Iowa, Louisiana, Minnesota, Montana, Nebraska, New Mexico, Virginia, and Wisconsin—most have been significantly influenced by the Model Penal Code structure. For example, states commonly adopt a limited number of culpability terms to be used throughout their codes, but retain the traditional "premeditation" state of mind terminology in homicide. See, e.g., MINN. STAT. ANN. § 609.185(1) (West Supp. 1980); NEB. REV. STAT. § 28-302(3) (Cum. Supp. 1978).

8. See, e.g., G. WILLIAMS, CRIMINAL LAW—THE GENERAL PART § 18 (2d ed. 1961) [hereinafter cited as WILLIAMS] (criticizing the distinction between purposeful and knowing). See text accompanying notes 149-54 *infra*.

9. This review of history has value beyond its historical interest. For example, it has been suggested that the requirement of mens rea in felony was the basis for the division of crime and tort. A. KIRALFY, POTTER'S OUTLINES OF ENGLISH LEGAL HISTORY 156, 158, 163-65 (5th ed. 1958). If this is true, an examination of the development of culpable state of mind distinctions may be the most significant inquiry into the nature of the criminal law as an independent and unique body of law.

10. See text accompanying notes 14, 15, 107 *infra*.

be excluded.¹¹ Still others attack the distinction between purposefully and knowingly, claiming it should have no real significance for determining criminal culpability.¹² One might also object to giving any significance to the distinction between reckless and knowing, that is, between intentionally doing an act which creates a *substantial risk* of causing a harm (reckless) and doing an act which one knows carries a *high probability* of causing the harm (knowing). These disputes commonly are argued on historical grounds.¹³

For example, Jerome Hall, perhaps the leading American opponent of negligent criminal liability, relies on historical evidence as one justification¹⁴ for his position:

History is often a dubious ground upon which to support a thesis. But when there has been a long and sustained movement in many legal systems, such as the progressive narrowing of negligence in penal law, . . . the significance of such historical evidence should not be ignored. Instead, it should place the burden upon the proponents of penalization of negligent behavior to prove that their opinion is sounder than the preponderant view of the judges expressed in the common law on this subject, especially in this century.¹⁵

Indeed, the "tradition of the common law" argument is used to attack or support other recognized levels of culpability. Strict liability, for example, can be condemned as a violation of the common law tra-

11. See text accompanying note 16 *infra*.

12. See text accompanying notes 149-54 *infra*.

13. See text accompanying notes 15, 107-09 *infra*.

14. The dispute over whether negligence or recklessness should mark the outer boundary of criminal liability is carried forward on several fronts. On the one hand, it is argued that actual awareness or foresight of the consequences should be required, because a person who by definition is unaware of the risk being taken cannot be deterred from taking it. J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 137 (2d ed. 1960) [hereinafter cited as HALL]; WILLIAMS, *supra* note 8, at 122-23, 150-52. Further, such people arguably do not deserve punishment because their defect is not moral, but rather one of knowledge or understanding that particular conduct may cause a particular harmful result. To punish such defendants is to punish them for being stupid. See Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 84 (1908-09).

On the other hand, many argue that just as the threat of punishment can cause people to exercise greater control over their conduct, so can it cause them to be more thoughtful of potential harms. WILLIAMS, *supra* note 8, at 123. See Hall, *Interrelations of Criminal Law and Torts: I*, 43 COLUM. L. REV. 753, 778 (1943); Hall, *Interrelations of Criminal Law and Torts: II*, 43 COLUM. L. REV. 967, 981-86 (1943); Wechsler & Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 751 (1952); MODEL PENAL CODE § 2.02, Comment 3 (Tent. Draft No. 4, 1955); MODEL PENAL CODE § 201.4, Comment 2 (Tent. Draft No. 9, 1959). Further, inattention and thoughtlessness are blameworthy as they are not inevitable states. See Brady, *Punishment for Negligence: A Reply to Professor Hall*, 22 BUFFALO L. REV. 107 (1972).

15. Hall, *Negligent Behavior Should be Excluded from Penal Liability*, 63 COLUM. L. REV. 632, 635 (1963). See also HALL, *supra* note 14, at 122, 133.

dition, a condemnation which necessarily follows if one accepts the conclusion of many that the common law rejected even negligent liability. Still better, strict liability can be denounced as entirely uncivilized if one believes other authorities that even the early Anglo-Saxons rejected the principle of absolute or strict liability for all harm caused.¹⁶

These shall be important collateral issues in the discussion of the history of distinctions in criminal culpability.¹⁷ To appreciate the historical evidence, however, the specific nature of the culpability distinctions set out in the Model Penal Code needs close examination. This examination will help to identify the distinctions by their content despite their differing historical labels.

The Distinctions

Each of the four Model Penal Code distinctions has dual significance. The narrow meaning of each distinguishes two adjacent culpable states. Of broader significance is the division the distinction creates in the culpability scheme as a whole. For example, the distinction between recklessness and negligence also distinguishes faultless and negligent conduct from reckless, knowing, and purposeful conduct.

People act "purposely" with respect to a result¹⁸ if their conscious

16. Winfield, *The Myth of Absolute Liability*, 42 LAW Q. REV. 37 (1926) [hereinafter cited as Winfield].

17. While these issues are undeniably important for their historical claims and while they are relevant to the substantive criminal law debate, they are not of great persuasive value in that debate. Criminal law, after all, is in a very future-oriented and pragmatic state, as reflected in the trend toward use of the criminal law as a mechanism to influence (deter) future conduct rather than to punish past violations. Despite the sincere exhortations of many participants, the historical arguments seem primarily make-weight in motive and makeshift in quality.

The drafters of the Model Penal Code, for example, in discussing § 2.02(3) (making recklessness the applicable culpable state of mind required when none is specified in the definition of the offense), note that "[t]his accepts as the basic norm what usually is regarded as the common law position." MODEL PENAL CODE § 2.02, Comment 127 (Tent. Draft No. 4, 1955) (citing WILLIAMS, *supra* note 8; and Turner, *The Mental Element in Crimes at Common Law*, 6 CAMBRIDGE L.J. 31 (1936)). However, they go on to note: "More importantly, it represents the most convenient norm for drafting purposes." MODEL PENAL CODE § 2.02, Comment 4 (Tent. Draft No. 4, 1955).

18. Culpable state of mind as to a result is used as an example. The culpable states of mind also are defined with respect to conduct and circumstances, at least where such definitions are meaningful. It is not meaningful, for example, to talk of recklessness or negligence with respect to one's own conduct. See MODEL PENAL CODE § 2.02(2)(c)-(d) (Proposed Official Draft, 1962). The concept of acting intentionally as to circumstances has similarly been called into question. REPORT OF THE SENATE COMMITTEE ON THE JUDICIARY TO ACCOMPANY S. 1437, S. REP. NO. 605, Part I, 95th Cong., 1st Sess. 58 n.13 (1977).

objective is to cause such a result.¹⁹ People act "knowingly" with respect to the result if it is not their conscious objective, yet they are practically certain or aware of a high probability that their conduct will cause the result.²⁰ The essence of the narrow distinction is the *presence of positive desire* for the result, in addition to knowledge of its near certainty. In the broader sense this distinction divides "maliciousness" or "viciousness" from mere "callousness." The former may be seen simply as an aggressively ruthless form of the latter, but the two nonetheless represent a distinguishable level of culpability.

People act "knowingly" with respect to a result if they are nearly certain or aware of a high probability that their conduct will cause the result. If they are aware only of a substantial risk, they act "recklessly" with respect to the result.²¹ The narrow distinction lies in the awareness of the *certainty of the risk*—"high probability" versus "substantial risk."²² The broader distinction is considerably more significant. Purposeful and knowing conduct is viewed as "wilful," while reckless conduct or less is at most "careless." Offenders whose conduct falls within the first category are condemned for "intentional" conduct; those in the latter are scolded for "taking risks."

People act "recklessly" with respect to a result if they are aware of, yet disregard, a substantial risk. The conduct is only "negligent" if the actor is not aware of the substantial risk, but should have been.²³ The narrow distinction is one of "awareness" versus culpable "unawareness" of risk.²⁴ The broader distinction is one of the most critical to criminal law. When defendants act purposefully, knowingly, or recklessly, they are aware of the harmful consequences that may result and

19. MODEL PENAL CODE § 2.02(2)(a)(i) (Proposed Official Draft, 1962).

20. *Id.* §§ 2.02(2)(b)(ii), 2.02(7). Section 2.02(7) elaborates on the definition of "practically certain" as used in § 2.02(2)(b), using the phrase "aware of a high probability." While § 2.02(7) is written only with reference to knowledge as to circumstance, it would seem equally applicable to knowledge as to whether conduct would cause a *result*. The commentary to this section does not contradict this view. MODEL PENAL CODE § 2.02, Comment (Tent. Draft No. 4, 1955).

21. MODEL PENAL CODE § 2.02(2)(c) (Proposed Official Draft, 1962).

22. The Model Penal Code drafters are careful to note that the determination of whether risk is "substantial" depends not only upon the particular likelihood of the result occurring, but also upon the situation at hand, including the countervailing interests. Indeed, they use the phrase "substantial and unjustifiable risk." See MODEL PENAL CODE § 2.02, Comment 3 (Tent. Draft No. 4, 1955).

23. MODEL PENAL CODE § 2.02(2)(d) (Proposed Official Draft, 1962).

24. Note that recklessness is defined to mean awareness of the risk that the result element will occur or that the circumstance element exists. Recklessness does not require awareness of the risk that the defendant by his or her conduct will be breaking the law or be subject to criminal liability. See *id.* § 2.02(9).

therefore arguably are both blameworthy and deterrable. But when defendants act negligently or faultlessly, the argument continues, they are unaware of such consequences and therefore cannot be fairly blamed or effectively deterred. In short, the reckless-negligent distinction hinges upon the *awareness of the defendant*.

Failure to appreciate the risk that a person's conduct will cause a specific result is "negligent" only if that failure "involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."²⁵ Thus, when the failure to perceive the risk does not deviate from the standard of care that a reasonable person would observe, an actor is not negligent and, with regard to the criminal law, is without cognizable fault. "Faultlessness" is used throughout this Article to denote this category. Liability imposed for faultless conduct is termed "absolute" or "strict" liability. The narrow distinction focuses upon whether the defendant's unawareness of the risk is a *failure to meet the objective standard of the reasonable person*. The broader distinction between faultlessness and the other four categories of culpability distinguishes conduct which grossly deviates from that of the reasonable, law-abiding person, and conduct which does not. Theoretical objections to strict liability obviously stem from a reluctance to punish reasonable conduct.

These are the distinctions recognized in the United States as most significant to criminal culpability. To be sure, one must separate recognition from implementation. All of these distinctions, and others,²⁶ are recognized; all have been implemented in a number of situations. None, however, has been adopted to distinguish different levels of culpability in all offenses or doctrines. In fact, only in the most serious offense, homicide, are all four culpability distinctions significant. Moreover, even where implemented, a distinction may serve only to mitigate culpability, not to exculpate.

The brief history that follows considers independently the historical development of each of the four distinctions, guided in part by how and when the criminal law first inquired into and considered determinative the presence of a positive desire, the certainty of the risk, the

25. *Id.* § 2.02(2)(d).

26. Some might distinguish between different degrees of recklessness in causing death, for example. Extreme recklessness, sometimes termed "abandoned and malignant heart" murder, often is distinguished from ordinary recklessness. See, e.g., CAL. PENAL CODE § 188 (West 1970); *People v. Poddar*, 10 Cal. 3d 750, 518 P.2d 342, 111 Cal. Rptr. 910 (1974). Murder based on intent to do grievous bodily harm may represent a degree of presumed recklessness as to death falling somewhere between these last two.

defendant's awareness of the risk, the failure to meet an objective standard, and the absence of objective fault.

A Brief History

A review of the history suggests that any conveniently concise historical conclusions will not be adequate or accurate.²⁷ At best, the history of the common law tradition—including periods of recent history, the common law, the medieval common law, the Anglo-Saxon antiquities, and probably preceding periods—may be recognized as reflecting a process of continuous development and, for the most part, refinement of culpability distinctions. This development, which extends over twelve centuries or more, was a continuous, if halting, series of predictable stages of recognition and implementation of the four culpability distinctions employed today. At any one time each of these various distinctions can be found in different stages of development. As our perspective broadens from a single period, we see changes; and as periods become ages the changes become trends. While one period or another may be given special historical significance, an understanding of the significance of the law or movements in the law within that period cannot help but be enhanced by an understanding of the longer-range trend of which it was a part.

In the first period,²⁸ liability was imposed without regard for the actor's culpable state of mind.²⁹ A distinction between what might be called "wilful" harms and "accidental" harms appeared during the second period and was the first reflection of concern for an actor's culpable state of mind. This generally represents the broader version of the modern knowing-reckless distinction. It is difficult, however, to know exactly how the older division would translate into modern terms. Today's "purposeful" no doubt would be included in yesterday's "wilful," and "faultless" included in "accidental." But the closer a case comes to the modern knowing-reckless distinction, the more difficult it is to determine how it would have been treated during this early period.

The third period recognized three categories of culpability. The exact nature of this development is unclear, but generally the accidental cases were distinguished further into careless and faultless accidents.

27. Compare 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 51 (3d ed. 1923) ("the common law operated under a principle of absolute liability") with Winfield, *supra* note 16, at 50-51 (the common law did not adopt the principle of absolute liability).

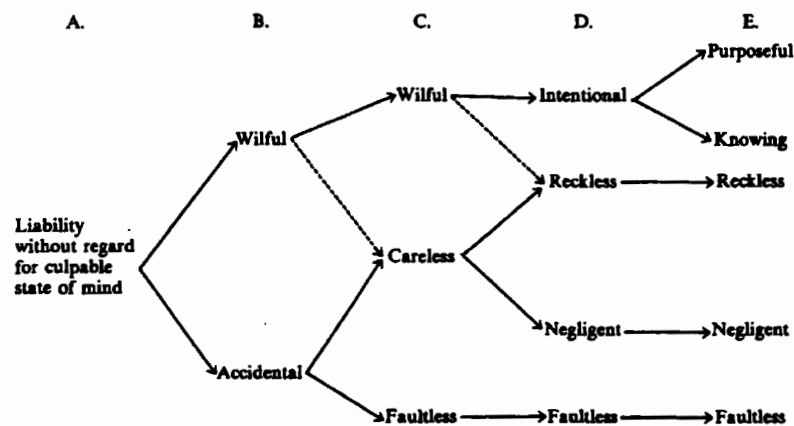
28. The term "period" is used in a broad sense. See text accompanying notes 32-33 *infra* for a discussion of the overlapping nature of the development of different distinctions.

29. The general process of recognition and implementation of the four broad distinc-

This division represents the first recognition of purely faultless conduct. In the fourth period reckless and negligent instances of carelessness were distinguished, although again the transition from three categories to four was not so neat as a simple subdivision of the careless category. In the fifth period, purposeful and knowing forms of intention were distinguished.

The surprising continuity and measured development of these five identifiable periods is matched only by the evidence of a process of development common to all the distinctions. There appears first a period of insensitivity to the distinction, then a recognition of it accompanied by either a rejection of or an indifference to its usefulness in distinguishing degrees of criminal culpability. When the distinction is first implemented, it usually is in the exercise of discretion by judges or the king to reduce the normal punishment in what appears to be a uniquely troublesome case. Even before this first evidence of implementation, however, the distinction often is applied *sub silentio* by juries.³⁰ As the use of the distinction grows, exercise of discretion becomes more common and eventually is institutionalized. Ultimately, the distinction is adopted formally in the substantive law to distinguish offenses or grades of an offense. At the same time, the distinction is given force in other contexts. For example, distinctions commonly appear first in cases of homicide,³¹ because the harm is of the greatest

tions used today can be depicted as follows:



30. See generally Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 MICH. L. REV. 414 (1976).

31. The focus on homicide is most useful in distinguishing the lesser forms of culpabil-

significance to civilized society and because the resulting punishment is the harshest, and are later applied to other offenses. Finally, the impact of the distinction tends to increase, from slight mitigation of punishment to a more dramatic reduction, in some cases even resulting in total exculpation.

These three patterns of growth in implementation—increase in the formality of implementation, in the contexts of use, and in the extent of the resulting mitigation—are rarely linear, however. Thus, a distinction which is a formal and significant mitigation in homicide cases may be purely a discretionary and negligible mitigation in assault cases. Further, the growth of a distinction often is erratic and usually is incomplete.³²

This complex and overlapping development, which differs for each distinction, makes a comparison of the relative extent of the adoption of each distinction difficult. Isolating the particular time when abstract recognition or practical discretionary implementation occurred may be possible, but the subsequent development can be compared only in gross terms.³³

Liability Without Regard to Culpable States of Mind

The first period was one in which culpability distinctions based upon the actor's state of mind were ignored. This is not to say liability for all harm caused was equal. The extent of the harm or the identity of the person or thing harmed no doubt were of great significance in determining the nature of the penal sanction imposed.³⁴ These were objective factors, however, unrelated to the state of mind of the offender.

Admittedly, there is some dispute as to whether there ever existed a time when no culpable states of mind were distinguished. Brunner's classic study³⁵ of primitive Germanic law, the earliest ancestor of the common law, suggests that in its earlier stages Germanic law did not recognize the basic distinction between accidental and intentional inju-

ity, but it presents special problems in distinguishing the higher forms. See text accompanying notes 155-56 *infra*.

32. Note that there is still no offense in which all distinctions are fully and formally implemented and that faultlessness, for example, is still only a mitigation in many instances, as recognized by "strict liability."

33. Some of these observations may seem commonsensical. But given the apparent irregularity and unpredictability which attends most social phenomena, it is mildly surprising that any logical development, such as it is, appears from a review of the history.

34. F. ATTENBOROUGH, *THE LAWS OF THE EARLIEST ENGLISH KINGS* 71 (1963).

35. H. BRUNNER, *DEUTSCHE RECHTSGESCHICHTE* (1906).

ries.³⁶ Brunner concludes: "The early law knows no such thing as accident, but seeks always for something to make answerable, and determines it, by a scarcely appreciable causation nexus, from the conditions of the harmful result."³⁷

Professor Wigmore gives an example of this state from the Northern mythology. In one myth, Loki, the jealous, causes Hodur, the blind god, to kill Baldur, the beautiful. Although Hodur's hand was guided by Loki such that he can hardly be said to have performed the act, Baldur's younger brother Woli, with the assent of the other gods, avenges Baldur's death by killing Hodur.³⁸ Wigmore explains that distinctions today attempt to adjust legal rules to fairness and social policy, "but the indiscriminate liability of primitive times stands for an instinctive impulse, guided by superstition, to visit with vengeance the visible source, whatever it be,—human or animal, witting or unwitting,—of the evil result."³⁹

Professor Winfield disagrees with Brunner and Wigmore. He argues: "No sane human being, ancient or modern, needs any mental education beyond that of general experience to say, 'A did not mean to do this,' and therefore to inflict a lighter penalty or possibly none at all. Medieval man is at least that much removed from a beast."⁴⁰

Holmes would seem to go even further when he suggests that "even a dog distinguishes between being stumbled over and being kicked."⁴¹ My own observation is that although a dog may realize that it has not been kicked, its first reaction nonetheless may well be to strike out at the offending limb. Indeed this reaction is consistent with what Holmes describes just a few pages later as "[t]he hatred for anything giving us pain, which wreaks itself on the manifest cause, and which leads even civilized man to kick a door when it pinches his finger"⁴² As Holmes explains the reaction: "An untrained intelligence only imperfectly performs the analysis by which jurists carry responsibility back to the beginning of a chain of causation."⁴³ But this same untrained mind may be similarly unable to distinguish intention from accident in response to a human intrusion. If the untrained mind is

36. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 316 (1894) (Pt. I) [hereinafter cited as Wigmore].

37. *Id.* at 319 (translating 2 H. BRUNNER, *DEUTSCHE RECHTSGESCHICHTE* 549 (1906)).

38. Wigmore, *supra* note 36, at 319-20.

39. *Id.* at 316.

40. Winfield, *supra* note 16, at 37.

41. O. HOLMES, *THE COMMON LAW* 3 (42d ed. 1948).

42. *Id.* at 11.

43. *Id.*

compelled to kick an inanimate object, it may be as likely to kick a human agent, whether the human act was intentional or accidental. Gradual refinement in the jurisprudential thinking of primitive minds would seem necessary for such minds to not only recognize a distinction between accident and intention in human sources of harm, but also to consider accident so compelling a mitigation as to restrain the immediate response dictated by "the hatred for anything giving us pain."

Note that the issue of whether the ancestors of the Anglo-Saxons totally ignored or rejected all distinctions of culpable states of mind is distinct from the issue of whether there was ever a period of absolute liability. Even if liability were absolute, it need not be imposed without regard to culpability distinctions. Harms caused faultlessly may have been punished (strict liability), yet punished less severely than wilful harms. While the move away from absolute liability often is viewed as the first development of a primitive distinction in culpability, history suggests otherwise. As the next two sections illustrate, the recognition of faultlessness was rather a refinement, in which a previously distinguished class, "accidents," was divided further into careless and faultless accidents.

Wilful versus Accidental

If the wilful-accidental distinction was ever unrecognized, its period of obscurity was brief. There is little dispute that there was an early awareness of the distinction.⁴⁴ As is often the case, early awareness was evidenced by a denial of the significance of the distinction to a determination of culpability. Thus, the so-called *Leges Henrici Primi*⁴⁵ (1118) notes repeatedly that "it is a rule of law that a person who un-

44. Holmes disagrees with most others and claims early law began by punishing only intentional wrongs, citing early Year Books. "It was only at a later day, and after argument, that trespass was extended so as to embrace harms which were foreseen, but which were not the intended consequence of the defendant's act. Thence again it extended to unforeseen injuries." *Id.* at 4. Holmes explains this by noting that the original system was based on vengeance: "Vengeance imports a feeling of blame, and an opinion, however distorted by passion, that a wrong has been done. It can hardly go very far beyond the case of a harm intentionally inflicted . . ." *Id.* at 3. But, six pages later, Holmes gives an example which seems to suggest just the opposite, *i.e.*, an action not based on the fault of the one held liable. *Id.* at 9.

45. *LEGES HENRICI PRIMI* (L. Dowder ed. 1972) [hereinafter cited as *LEGES HENRICI PRIMI*]. There is doubt as to whether they are actually a compilation of the laws of Henry I. T. PLUNKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 255-56 (5th ed. 1956); 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 99-101 (2d ed. 1968) [hereinafter cited as *POLLOCK & MAITLAND*]; P. WINFIELD, *CHIEF SOURCES OF ENGLISH LEGAL HISTORY* 49 (1925).

wittingly commits a wrong shall wittingly make amends."⁴⁶

Earlier evidence of recognition⁴⁷ appears in the *Laws of Alfred* (871-899):

Let the man who slayeth another wilfully perish by death. Let him who slayeth another . . . unwillingly or unartfully, as God may have sent him unto his hands, and for whom he has not lain in wait, be worthy of his life, and of lawful 'bot,' if he seek asylum. If, however, anyone presumptuously and wilfully slay his neighbor through guile, pluck thou him from my altar, to the end that he may perish by death.⁴⁸

Medieval Frisian chronicles from 1439 give another interesting illustration:

Owen Alwerk was brewing beer. During his absence the child of Swein Pons came in and stood by the kettle. The kettle slipped from its hook, and the liquid burned the child so that it died on the third day. The relatives of the child pursued Alwerk, who fled to the house of a friend for refuge. The master of the house opposed the entrance of the pursuers, and an affray ensued, in which the master by inadvertence killed his own nephew. The affair was laid before six men as judges; and they decided at first that Alwerk must pay the head-money for the child and for the dead nephew, and must besides make a pilgrimage to Rome. But Alwerk opposed the judgment, and to such good purpose that they altered it to this effect,—that he should be absolved without more from the child's death, and from the nephew's if he swore that he did not urge on the master of the house to fight.⁴⁹

Despite this early recognition, there is some confusion as to when

46. *E.g.*, LEGES HENRICI PRIMI, *supra* note 45, §§ 42, 1 at 151; 70, 12a-b at 223; 88, 6a at 271; 90, 1 at 279; 90, 11a at 283.

47. Although this is the earliest evidence of recognition of the distinction of which the author is aware in the common law tradition, other cultures may have recognized it earlier. For example, under Roman law casual homicide was excused only by the indulgence of the emperor. Hebrew law required flight to a city of refuge when a man was killed by accident while cutting wood. See Wigmore, *supra* note 36, at 321 n.3 (citing 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *187 (1869) [hereinafter cited as BLACKSTONE]).

48. ANCIENT LAWS AND INSTITUTES OF ENGLAND 47-49 (B. Thorpe ed. 1840) (quoting *Laws of Alfred*). Other passages in *Laws of Alfred* note the recognition of the intentional-accidental distinction: "If one man kills another unintentionally, [by allowing a tree to fall on him] while they are engaged on a common task, the tree shall be given to the [dead man's] kindred, and they shall remove it within 30 days from the locality. Otherwise, it shall be taken by him who owns the wood." F. ATTENBOROUGH, LAWS OF THE EARLIEST ENGLISH KINGS 71 (1963) (quoting *Laws of Alfred*). "If anyone entrusts a [child or other] helpless person who is dependent on him to another, and the person accepting the charge causes the death of the person committed to him, he who nurtured him shall clear himself of criminal intention, if anyone prefers such an accusation against him." *Id.* at 73.

49. Wigmore, *supra* note 36, at 320 (translating RICHTHOFEN, FRIESISCHE RECHTSQUELLEN 570 (1439)).

the distinction was first implemented. The fable, which would seem to mark a transitional stage, is very late, 1439. The *Laws of Alfred* (871-899) passage clearly provides a mitigation (the "bot" must still be paid, but the offender's life is spared). Yet the later passage from *Leges Henrici Primi* (1118) seems to reject the significance of the distinction.

As Brunner points out, the necessity for an express mention of the imposition of liability, as in the *Leges Henrici Primi* provision, often is an indication that the popular regard for such imposition is on the wane.⁵⁰ Indeed, the *Leges Henrici Primi* contains the following passage which indicates, with some drama, a transitional period of encouraged mercy for accidental killings:

If a person in the course of a game of archery or of some exercise kills anyone with a spear or as the result of some accident of this kind, he shall pay compensation for him.

For it is a rule of law that a person who unwittingly commits a wrong shall consciously make amends.

He ought however to be the more accorded mercy and compassion at the hands of the dead man's relatives. The more we understand that the human race grows sick with the harshnesses of a cruel fortune and with the melancholy and wretched lamentation of all.⁵¹

Similarly, the *Leges Henrici Primi* also contains the famous phrase "a person is not to be considered guilty unless he has a guilty intention."⁵² There is near consensus among historians, however, that this last phrase was not the law at the time of Henry I, but rather "an exotic transplant from St. Augustine."⁵³ Further, the phrase appears only in the context of perjury⁵⁴ where such a rule is a natural by-product of the unique nature of the offense.

On the other hand, the first proverb, "he who unwittingly commits a wrong shall wittingly make amends," nearly always appears in the midst of provisions which suggest that mercy should be shown to the unwitting offender, that less compensation be exacted for an unwitting harm:

50. Wigmore, *supra* note 36, at 320-21 (citing H. BRUNNER, *DEUTSCHE RECHTSPESCHICTE* (1906)). Pollock and Maitland note the possibility of the same phenomena. After discussing the *Leges Henrici Primi* proverb—"a person who unwittingly commits a wrong"—they note that it had been thought by some to extend even to harm done by a stranger with weapons of the owner left unguarded. Cnut's laws expressly overrule this theory "as if it were at least an unsettled point, that only the actual wrong-doer shall be liable. . . ." 1 POLLOCK & MAITLAND, *supra* note 45, at 54.

51. *LEGES HENRICI PRIMI*, *supra* note 45, §§ 88,6 to 88,6b at 271.

52. *Id.* §§ 5,28b at 95; 88,8 at 273.

53. Winfield, *supra* note 16, at 41. He suggests that "a safer course is to bracket both maxims as pretty useless without weighing them in the contexts in which they appear." *Id.*

54. *LEGES HENRICI PRIMI*, *supra* note 45, §§ 5,28; 5,28a at 95.

There are very many kinds of misfortune which occur by accident rather than by design and which should be dealt with by the application of mercy rather than by formal judgment.

... For it is a rule of law that a person who unwittingly commits a wrong shall wittingly make amends; he who 'brecht ungepealdes betan gepealdes'.

... In circumstances in which a man cannot lawfully swear that a person was not through his agency further from life or nearer to death, he shall pay appropriate compensation, according to the facts of the case.

... Among these circumstances are the following cases: if anyone, by the dispatch of another, is the cause of his death while on the errand; if anyone sends for a person and the latter is killed while coming

... In these and similar cases where a man intends one thing and something else results (where what is actually done is the subject of the accusation, and not the intention) the judges shall for preference fix a compensation determined on grounds of compassion and intended to repair any violation of honour, as appropriate to the circumstances.⁵⁵

This passage obviously is confusing, waivering as it does between the two contradictory principles of ignoring the wilful-accidental distinction and using it as a basis for mitigation.⁵⁶

These inconsistencies suggest that by the Anglo-Saxon period the distinction was *recognized* and that it *may* have been partially implemented by the time of Henry I. The data limits this conclusion to only partial implementation, if any, for one hundred years after the time of Henry I; Glanvill's writing (1187)⁵⁷ reflects neither implementation nor recognition of the distinction when he described the law of homicide:

There are two kinds of homicide. The first is called murder: this is done secretly, out of sight and knowledge of all but the killer and his accomplices, and so cannot be immediately followed by the hue and cry which is required by the relevant assize. . . .

There is another kind of homicide which in ordinary speech is called simple homicide.⁵⁸

The only distinction Glanvill accounts for is procedural and this distinction is not significant to a discussion of culpable states of mind. In this period, however, rules of substantive law commonly were not codified. Instead what we now call "substantive law" normally was left to the sound discretion of the jury or judges, and only "procedural law"

55. *Id.* ¶¶ 90,11 to 90,11d at 283.

56. Winfield, *supra* note 16, at 41-42.

57. THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL (G. Hall ed. 1965).

58. *Id.* at 174. See generally 2 POLLOCK & MAITLAND, *supra* note 45, at 478-88.

was codified.⁵⁹

In any case, by 1256 Bracton had explicitly distinguished intentional and accidental homicides, *ex casu* or *per infortunium*.⁶⁰ In speaking of "the crime of homicide, whether accidental or intentional," Bracton noted that "the two do not involve the same punishment since in one there is severity and in the other mercy."⁶¹ But Bracton's account, according to most commentators, does not accurately present the law of 1256. He borrowed liberally from Roman and canon law,

59. See, e.g., 1 POLLOCK & MAITLAND, *supra* note 45, at 136.

60. 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 340-42 (G. Woodbine ed. & S. Thorne trans. 1968) [hereinafter cited as BRACTON]. Bracton explains: "It is the duty of the judge to impose a sentence no more and no less severe than the case demands; he must seek a reputation neither for severity nor clemency but, having weighed the circumstances, should determine as each case requires. . . . [Offenses are committed intentionally, by impulse or by accident]. Robbers commits [sic] offences intentionally, by deliberation; those who are drunk, by impulse, moved by their drunkenness, when a matter comes to blows or the sword; by accident, when they occur through misadventure, as where in hunting one kills a man by a spear thrown at a beast, or does some similar act." *Id.* at 299. Then, in listing factors which the judge should consider when imposing sentence he includes "[f]ortuity, as where one does some act intentionally and with full understanding, as homicide, or does it accidentally, as above. Depending upon this his deed will be either felony or misadventure." *Id.* at 299-300. The passage continues: "There is pecuniary as well as corporal punishment, but every corporal punishment, though of the slightest, is greater than any pecuniary one." *Id.* at 300. Fleta (1290) repeats the distinction. 2 FLETA, PROLOGUE, BOOKS I AND II at 46 (Selden Society v.72, H. Richardson & G. Sayles ed. 1955) [hereinafter cited as FLETA].

In another passage, Bracton describes in detail what he means by "accidental homicide": "*Of homicide through misadventure and accident.* Of accidental homicide. [Accidental homicide], which was touched upon above, may be committed in many ways, as where one intending to cast a spear at a wild beast /or does something of the sort, as where playing with a companion he has struck him in thoughtless jest, or when he stood far off when he drew his bow or threw a stone he has struck a man he did not see, or where playing with a ball it has struck the hand of a barber he did not see so that he has cut another's throat, and thus/ has killed a man, not however with the intention of killing him; he ought to be absolved, because a crime is not committed unless the intention to injure exists, <It is will and purpose which mark *maleficia*, nor is a theft committed unless there is an intent to steal.> as may be said of a child or a madman, since the absence of intention protects the one and the unkindness of fate excuses the other. In crimes the intention is regarded, not the result. It does not matter whether one slays or furnishes the cause of death. But here we distinguish between true cause [and cause in] misadventure, by animals which lack reason, or other movable things, which provide the *occasio*, as a ship, a tree that crushes and the like. Properly speaking stationary things, as a house or a rooted tree, provide neither the cause nor the occasion, /nor do moving things sometimes, neither a ship nor a boat in salt water, though it may in fresh, by mishandling,/ but he who conducts himself stupidly, as in many other cases." 2 BRACTON, *supra*, at 384.

Britton (late 1200s) also makes the intentional-accidental distinction and provides a similar description of accidents. 1 BRITTON 38-39 (F. Nichols trans. 1865).

61. 2 BRACTON, *supra* note 60, at 298. The intentional-accidental distinction and the attendant mitigation of punishment for mischance are repeated in 2 FLETA, *supra* note 60, at 35.

presenting his legal ideal rather than describing a legal reality.⁶²

In summary, the distinction between intentional and accidental conduct was recognized very early, although it may not have been implemented until the tenth century. As late as the thirteenth century it may have been given significance only infrequently. Even after accidental and intentional cases were distinguished there was a period in which careless and faultless accidents were not distinguished.⁶³

Assessing the Time of Implementation

One of the difficulties in assessing what "the law" is at any particular time is the existence of the three separate growth patterns noted earlier.⁶⁴ This is especially true of the growth from the informal exercise of discretion in rare cases to institutionalization of the exercise of discretion to formal adoption of the distinction as part of the substantive law. There is no single point at which "the law" has adopted and implemented the distinction.

The growth of the distinction of accidental harms, "misadventure," illustrates this evolution. The *Leges Henrici Primi* recites what appears to be the decision of an earlier case in which creative judgment compensated for the lack of an official mechanism for mitigation:

If a man falls from a tree or some man-made structure on to someone else so that as a result the latter dies or is injured, if he can prove he was unable to avoid this, he shall in accordance with ancient ordinances be held blameless.

. . . Or if anyone stubbornly and against the opinion of all takes it upon himself to exact vengeance or demand wergeld, he shall if he wishes climb up and in similar fashion cast himself down on the person responsible.⁶⁵

By 1214 a procedure became available which could be used to implement the distinction, namely, petition to the king for a pardon: "Roger of Stainton was arrested because in throwing a stone he by misadventure killed a girl. And it is testified that this was not by felony. And this was shown to the king, and the king, moved by pity, pardoned him

62. BRACTON AND AZO at xviii, xx (Selden Society v.8, F. Maitland ed. 1895); 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 267-90 (3d ed. 1923); H. MAINE, ANCIENT LAW 87 (F. Pollock ed. 1906); P. WINFIELD, CHIEF SOURCES OF ENGLISH LEGAL HISTORY 60-62 (1925).

63. See generally 1 POLLOCK & MAITLAND, *supra* note 45, at 53-56.

64. See text accompanying notes 30-32 *supra*.

65. LEGES HENRICI PRIMI, *supra* note 45, §§ 90, 7 to 90, 7a at 283. See also Wigmore, *supra* note 36, at 324 n.4.

the death. So let him be set free."⁶⁶ This petitioning procedure was institutionalized in 1278 by the Statute of Gloucester. In cases of misadventure the jury was neither to acquit nor to convict, but rather to render a special finding of self-defense or misadventure:⁶⁷ "If one kills another . . . by misadventure, he shall be held liable, but the judge shall inform the king, 'et le roy lin en fera sa grace, s'il lin plaist.'"⁶⁸ Coke suggests that the Statute of Gloucester required the king to pardon all such cases,⁶⁹ but the better view is that it established his ability to pardon and continued to leave the exercise of that power to his discretion.⁷⁰ In any case, by 1310 the petitions were granted as a matter of course.⁷¹ By the time of the treatise writers, beginning with Staundforde at the end of the sixteenth century, a person who killed by misadventure was categorized differently as a matter of substantive law⁷² and was entitled to purchase a pardon;⁷³ however, that person continued to forfeit goods. Thus the cycle from an occasional expression of mercy to outright entitlement took five centuries or more.⁷⁴

The extent of mitigation of punishment during this period generally was comparable to the development from occasional pardon to entitlement. In the earliest period, the offender might escape death at the

66. 1 SELECT PLEAS OF THE CROWN no. 114 at 67 (Selden Society v.1, F. Maitland ed. 1888). This may be the earliest case in which the distinction was used.

67. 3 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 36-37 (1883). [hereinafter cited as STEPHEN].

68. Statute of Gloucester, 1278, 6 Edw. I, c. 9. See also 1 FLETA, *supra* note 60, at 60-61.

69. E. COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 316 (London 1809).

70. See, e.g., 3 STEPHEN, *supra* note 67, at 37; Parker, *The Evolution of Criminal Responsibility*, 9 ALBERTA L. REV. 47, 63 n.96 (1971).

71. 3 STEPHEN, *supra* note 67, at 38 (referring to an entry upon the Parliament Roll of 3 Edw. 2, "in answer to a petition complaining of the ease with which pardons were granted to homicides and other offenders . . .").

72. 3 STEPHEN, *supra* note 67, at 46-50.

73. See 4 BLACKSTONE, *supra* note 47, at *188; M. DALTON, THE COUNTRY JUSTICE 221-22 (1622); 1 E. EAST, A TREATISE ON THE PLEAS OF THE CROWN 279 (London 1803) [hereinafter cited as EAST]; M. FOSTER, REPORT OF CROWN CASES AND DISCOURSES 288-89 (3d ed. 1809); 3 STEPHEN, *supra* note 67, at 46-47.

74. Wigmore notes this trend of increased institutionalization of the distinction between wilful and accidental: "As times change, and superstition begins to fade, the notion of 'misadventure,' 'ungefähr,' is hazily evolved, and facts of the sort are regarded as ground for an appeal to the king or the lord on the offender's behalf. The strict law is thus regarded as requiring his punishment; but no vengeance can be wreaked upon him, no blood-feud started by the members of the victim's family." Wigmore, *supra* note 36, at 322. Wigmore gives as examples: 2 BRACTON, *supra* note 60, at 297-98; Statute of Gloucester, 1278, 6 Edw. I, c.9; 2 FLETA, *supra* note 60, at 60; 1 SELECT PLEAS OF THE CROWN nos. 114 & 188, at 67, 119 (Selden Society v.1, F. Maitland ed. 1888).

hands of the victim's family, but still had to pay the "bot."⁷⁵ Later when the bloodfeud disappeared, the offender still was required to pay a portion of the ordinary payment.⁷⁶ When the offense was treated solely as one against the king, and not against the victim's family, mitigation naturally enough took the form of pardon from death, with forfeiture of goods required.⁷⁷

As the first trend of increased formality in implementation ended in entitlement to a pardon, another pattern of growth, increased mitigation, emerged. By 1700 the defendant often was allowed a writ of restitution for goods⁷⁸ and by 1762 Foster argued that juries should and often did acquit such an offender altogether without rendering a special verdict (and thereby causing a forfeiture).⁷⁹ Not until 1828, however, was the forfeiture formally abolished by statute.⁸⁰

The third pattern of growth, effectuation of the distinction in a greater number of offenses or doctrines, was rare in the early periods.⁸¹ While implementation ultimately became commonplace in a variety of offenses, even today there are many significant instances where this fundamental distinction is ignored. Accidental harms caused in the

75. Wigmore, *supra* note 36, at 324. "Bot" was a general term of compensation for private wrongs. In homicide, the amount would be determined by the "wer" of the slain person, a monetary figure representing that person's "worth" or status in life. For lesser harms, the "bot" would be based on the "wer" of the offender. "Wite" was a penal fine paid to the king or other public authority, often with reference to the "wer" of the offender, but later becoming graduated according to the seriousness of the offense rather than the status of the offender. 1 POLLOCK & MAITLAND, *supra* note 45, at 48; 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 47, 54 (3d ed. 1923).

76. Wigmore, *supra* note 36, at 324. See Wigmore's examples from foreign cultures. *Id.*

77. In the thirteenth century "we find the primitive notion still living; in cases of homicide, at least, the slayer forfeited goods and paid some fine or fee to the king in a criminal process, and in probably all torts the harmdoer paid some compensation to the injured party." Wigmore, *supra* note 36, at 325.

78. See 4 BLACKSTONE, *supra* note 47, at *188.

79. M. FOSTER, REPORT OF CROWN CASES AND DISCOURSES 279-89 (3d ed. 1809). Foster expresses some doubt that forfeiture was the common practice in cases of *per infortunium*. *Id.* at 288. But see 3 STEPHEN, *supra* note 67, at 76-77.

80. 1828, 9 Geo. 4, c.31, § 10; 3 STEPHEN, *supra* note 67, at 77.

81. For example, the distinction very early was recognized, but not implemented, in the offense of injuring a corpse. Professor Wigmore notes: "Who injures the corpse of a man whom another has killed, either by cutting off the head or the ear or the foot, or by otherwise drawing the slightest blood, pays a fine of twelve shillings." The example then given is this: The corpse of a murdered man is discovered by birds of prey, who settle upon it to devour it; a man sights them and draws bow at them, but strikes the corpse so that it is wounded: he shall pay the fine." Wigmore, *supra* note 36, at 321.

The implementation of the distinction in homicide cases has been discussed previously. See note 61 *supra*. It also appears early in other serious felonies, such as arson. See, e.g., THE MIRROR OF JUSTICES 101 (Selden Society v.7, W. Whitaker ed. 1895).

course of an unlawful act have been and are treated still as wilful harms. The felony-murder and misdemeanor-manslaughter rules provide modern examples.⁸² Rejection of mistakes of law ("accidents" in knowledge) as a basis for mitigation is a strong common law tradition,⁸³ as are many aspects of the laws of complicity and conspiracy in which an offender can be held liable for acts done by others which the offender did not wilfully cause.⁸⁴

Careless versus Faultless

Wigmore suggests that until 1200 only the wilful-accidental distinction was made:

[N]o distinction as to negligence or the like was yet made; it was either "misadventure," "unwitting,"—that is, not intentional,—or wilful, intentional. . . . [This] state of things still corresponded in essence with prevailing ethical notions; the man was getting fair dealing as far as the standards of the time went.⁸⁵

As a matter of implementation of a new distinction this may be true, but historical evidence suggests that another distinction was at least *recognized* at this time. Sensitivity to two different sorts of accidents,⁸⁶ careless and faultless, was developing.

Awareness of degrees of blameworthiness in accidents was demonstrated almost contemporaneously with implementation of the wilful-accidental distinction. The *Leges Henrici Primi* provides:

If anyone runs against or falls on a person's weapons so that as a result he dies, and it is evident that it is the fault of himself alone, then the responsibility shall lie there.

However, the person whose weapons they were shall not carry them carelessly.

In legal proceedings of this kind consideration must be given to the manner of carrying or laying down weapons; the place in which they were laid down, the person who laid them there, what hap-

82. See, e.g., W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 545-47 (1972). See note 120 *infra*.

83. See, e.g., 1 M. HALE, HISTORIA PLACITORUM CORONAE 42 (1736) [hereinafter cited as HALE].

84. *Id.* at 615-18.

85. Wigmore, *supra* note 36, at 442.

86. The transition from wilful-accidental to intentional-careless-faultless was not as symmetrical as might be hoped. "Accidental" cases may not perfectly align with "careless-faultless" cases. That is, some cases previously termed wilful, as opposed to accidental, now may be termed careless. The difficulty may be in distinguishing between the "growth of the context of implementation" of the wilful-accidental distinction on the one hand, from a case of realignment of the wilful-accidental distinction on the occasion of its translation into the more refined intentional-careless-faultless, on the other.

pened, and how it happened.⁸⁷

An even earlier demonstration appears in the *Laws of Alfred*:

A man carrying a spear should carry it level on his shoulder in order to be free from blame if another runs upon the point. If the point is three fingers or more above the butt (so as to bring the point to the level of a man's face), he will be liable to pay *wer* in case of a fatal accident, and all the more if the point were in front (so that he could have seen the other's danger).⁸⁸

Such awareness of differences in degrees of blameworthiness in accidents was rare, and implementation was probably nonexistent,⁸⁹ in the early period of the wilful-accidental distinction. These passages, however, confirm at least partial recognition of a careless-faultless distinction by the ninth or tenth centuries. Winfield concurs in this assessment; after studying the ninth, tenth, and eleventh centuries, he concludes that "there was a rough appreciation of the distinction between intention, inadvertence, and inevitable accident."⁹⁰

87. LEGES HENRICI PRIMI, *supra* note 45, §§ 88, 1 to 88, 2 at 269. See text accompanying note 55 *supra*. The evaluation of the blame of the actor also apparently depended upon a notion of contributory carelessness in the victim. "If a woman commits homicide, vengeance shall be taken against her or her descendants or her blood relatives (or she shall pay compensation for it), not against her husband or his innocent household.

"Amends shall nonetheless be made whether these things are done intentionally or unintentionally.

"For the wrongs which we commit unwittingly we must set right by deliberate intention. However, the possibility of a friendly settlement or of clemency is to be treated as the more likely or the more remote depending on the degree of blame attaching to the person who has been slain, and according to the circumstances." LEGES HENRICI PRIMI, *supra* note 45, §§ 70, 12 to 70, 12c at 223.

88. 1 POLLOCK & MAITLAND, *supra* note 45, at 53-54 (citing *Laws of Alfred*). See also ANCIENT LAWS AND INSTITUTES OF ENGLAND 37-38 (B. Thorpe ed. 1840). But Pollock and Maitland say: "This is rational enough; but in the case of harm ensuing even by pure accident from a *distinct voluntary act*, we find that the actor, however innocent his intention, is liable, and that the question of negligence is not considered at all. *Legis enim est qui inscienter peccat, scienter emendat*, says the compiler of the so-called laws of Henry I, translating what was doubtless an English proverb. There is no earlier English authority, but such is known to have been the principle of all old Germanic laws." 1 POLLOCK & MAITLAND, *supra* note 45, at 54 (emphasis added). For a discussion of the analogous development in tort law see Wigmore, *supra* note 36, at 442-43.

89. See text accompanying notes 44-84 *supra*.

90. "So far our investigation has shown that there were many instances in which a man did not act at his peril; that in theory there was a tendency to hold a man liable for some (but not all) purely accidental harm; that in practice this harsh rule was made workable by judicial variation of penalties; and that there was a rough appreciation of the distinction between intention, inadvertence, and inevitable accident." Winfield, *supra* note 16, at 42. Apparently Professor Winfield is speaking of the period of Ethelred (866), Cnut (1017), and *Leges Henrici Primi* (1118). Note that Winfield rejects the existence of the first period discussed, in which equal liability was imposed for all harms caused, but acknowledges the existence of the third period, in which intentional, careless, and faultless conduct are distinguished. Wigmore on the other hand recognizes the first period and the second, in which intentional

Evidence of the first instance of the implementation of the distinction, as before, is confusing and contradictory. Sometime during the thirteenth and fourteenth centuries the law came to give practical effect to the distinction between accidents in which due care had been exercised (faultless) and those in which it had not (careless). In discussing divisions of homicide Bracton (1256) explained:

By chance, as by misadventure, when one throws a stone at a bird or elsewhere and another passing by unexpectedly is struck and dies, or fells a tree and another is accidentally crushed beneath its fall and the like. But here we must distinguish whether he has been engaged in a proper or an improper act. Improper, as where one has thrown a stone toward a place where men are accustomed to pass, or while one is chasing a horse or ox someone is trampled by the horse or ox and the like, here liability is imputed to him. But if he was engaged in a lawful act, as where a master has flogged a pupil as a disciplinary measure, or if [another is killed] when one was unloading hay from a cart or cutting down a tree and the like, and if he employed all the care he could, that is, by looking about him and shouting out, not too tardily or in too low a voice but in good time and loudly, so that if there was anyone there or approaching the place, he might flee and save himself, or in the case of the master by not exceeding the mean and measure in the flogging of his pupil, liability is not imputed to him. But if he was engaged in a lawful act and did not employ due care, liability will be attributed to him.⁹¹

Thus Bracton distinguished accidents where the actor behaved lawfully and with due care from accidents in which the conduct was unlawful or without due care. Unlawful conduct may be seen as a gross but easily determined approximation of whether the actor has used due care or may be seen at least as the moral equivalent of conduct careless as to the harm.

Whether Bracton's account was prescriptive or descriptive of the law in only a few regions,⁹² it was an accurate prediction of the course of the common law. The homicide distinctions he made were essentially the same as those Stephen employed in 1883 when he described the law of homicide.⁹³ What is more, it seems likely that Bracton's

and accidental conduct are distinguished, but suggests that the next period in the history is essentially that which is described herein as the fourth—where negligence is distinguished. See text accompanying note 85 *supra*. He seems to ignore the possibility of the third period, the one period Winfield acknowledges.

91. 2 BRACTON, *supra* note 60, at 341. This essentially is repeated by 2 FLETA, *supra* note 60, at 60.

92. 3 STEPHEN, *supra* note 67, at 35-36.

93. *Id.* at 32-33.

statements contributed to the adoption of such distinctions.⁹⁴

Significantly, "due care" as used by Bracton may not have had the same meaning as it has today. Bracton did not speak of the due care of "the reasonable person" or "as might be expected of the actor," but rather required that the actor have employed "all the care he could." Bracton's terminology is consistent with that of his peers and successors in their classification of accidents as either avoidable or unavoidable (inevitable).⁹⁵ Recall the case noted earlier⁹⁶ of the man who fell from a tree killing another. The man was to be held blameless only "if he [could] prove he was unable to avoid [the accident]."⁹⁷ Thus while careless and faultless accidents were distinguished, the instances in which carelessness would be attributed to an actor were considerably greater than would occur under the modern standard requiring a "substantial" or "gross" deviation from the conduct of a reasonable, law-abiding person in the actor's situation.⁹⁸ The boundary of criminal liability thus was retracted only slightly at first; but this is what one would expect when the transition is from a stage in which faultless accidents were not distinguished at all.⁹⁹

In summary, sometime near the beginning of the tenth century the distinction between careless and faultless accidents was recognized. There is no direct evidence that it was implemented before Bracton in 1256. Nonetheless, the lack of authoritative sources during the 100 years prior to Bracton's writing and the frequency and certainty of his

94. See Parker, *The Evolution of Criminal Responsibility*, 9 ALBERTA L. REV. 47, 69 n.132 (1971).

95. 2 FLETA, *supra* note 60, at 60.

96. See note 65 & accompanying text *supra*.

97. LEGES HENRICI PRIMI, *supra* note 45, § 90,7.

98. See, e.g., MODEL PENAL CODE § 2.02(2)(c)-(d) (Proposed Official Draft, 1962) ("recklessly" and "negligently" defined).

99. The unavoidable standard is consistent with and may have originated in the then-prevalent conceptual equation of faultless accidents and self-defense. For five centuries joint reference was made to cases of *per infortunium* and *se defendendo*. See 3 STEPHEN, *supra* note 67, at 29 (discussing Bracton); 61, 65 (discussing Hale). As late as 1828, the statute which abolished the forfeiture for homicide by misadventure also abolished the penalty for homicide committed in self-defense. *Id.* at 77. The unavoidability language remains entirely appropriate for a plea of self-defense. The defense was available only if the defendant had taken all other defensive action short of killing. In modern terminology, this is the requirement that the killing be necessary. Today, the retreat rule and faultless accident, consistent with their common heritage, have been partially sacrificed to further various public policy interests, with opposite effects on defendant liability. Today one need not always retreat—attempt to avoid a killing—to retain a self-defense plea. See MODEL PENAL CODE § 3.04(2)(b)(i)(1)-(2) (Proposed Official Draft, 1962). Similarly, one may not always be exculpated if the accident was unavoidable, as in cases where strict liability is applicable. See MODEL PENAL CODE § 2.05, Comment (Tent. Draft No. 4, 1955).

mention of the distinction may indicate that the distinction had been implemented for some time before 1256.¹⁰⁰

Reckless versus Negligent

Those cases termed "carelessness" eventually were further distinguished into cases of "recklessness" and "negligence," according to whether the defendant was aware of the risk created (recklessness), or was not but should have been aware (negligence). Although such labels were not used, early traces of sensitivity to the awareness of risk which distinguishes these situations can be seen. For example, the *Laws of Alfred* contain an instruction providing that

[i]f an ox gore a man or a woman, so that they die, let it be stoned, and let not its flesh be eaten. The lord shall not be liable, if the ox were wont to push with its horns for two or three days before, and the lord knew it not; but if he knew it, and he would not shut it in, and it then shall have slain a man or a woman, let it be stoned; and let the lord be slain, or the man be paid for, as the "witan" decree to be right.¹⁰¹

This does not necessarily show an awareness of the distinction as a general principle of culpability. The statement is sensitive to the actor's failure to pen an ox known "to be want to push," but not to a general principle concerning failure to avoid a known risk. It does, nonetheless, show a potential for later recognition of the principle. Such factual hints of a reckless-negligence distinction are rare, however, and suspect.¹⁰² The *Laws of Alfred*, like the Bracton passage noted earlier,

100. It is important to note the difficulty of fully isolating the events of the history of the careless-faultless distinction described herein and, therefore, their somewhat speculative character. The growth in mitigation of the wilful-accidental distinction seriously interferes with the isolation of the careless-faultless distinction, as the prime result of this new distinction is to mitigate further. Thus, instead of relying upon the existence of mitigation to identify a new group of cases, which worked nicely in spotting the creation of the "accidental" category, one of two less reliable signs must be relied on. First, full exculpation may be looked at to pinpoint recognition of a "faultless" category. But this assumes that this category will be exculpated from the start, an improper assumption as the history in many different situations suggests that the lower levels of culpability were at first mitigated and only later exculpated. Second, the actual language of the law or case may be viewed to see the distinction. But, as seen in the case of the wilful-accidental distinction, such language distinctions often come long after the principle of the distinction has been implemented in practice. This seems especially true with the careless-faultless distinction because the "misadventure" label remained in use for so long.

101. ANCIENT LAWS AND INSTITUTES OF ENGLAND 22 (B. Thorpe ed. 1840).

102. Regarding this passage in the *Laws of Alfred*, Stephen concludes: "Whether these re-enactments of the Mosaic law were practically more than a kind of denunciation of homicide on religious grounds, or whether they were actually executed as law, it is now of course impossible to say; but it is obvious that the enactments themselves are very meagre." 3 STEPHEN, *supra* note 67, at 24.

often included pro forma adoptions of canon law.¹⁰³ In fact, this particular passage concerning the ox is taken directly from *Exodus*.¹⁰⁴ Unlike the careless-faultless distinction, this time the transplant did not take root and the distinction was generally unrecognized for another eight centuries.¹⁰⁵

Professor Hall argues that the common law distinguished negligence and rejected it as a basis for criminal liability.¹⁰⁶ Professor Hall's British counterpart in the negligence debate, Professor Turner, similarly insists: "There has developed in the common law a principle that a man should not be punished unless he had been aware that what he was doing might lead to mischievous results; he must have had foresight of the consequences of his conduct."¹⁰⁷ In Turner's view, instances of criminal liability, in the absence of foresight, are therefore "anomalous" cases reflecting a "primitive position" on criminal liability.¹⁰⁸ Indeed, the view that the common law rejected negligent liability has been the generally accepted wisdom of the past half century.¹⁰⁹

It does seem likely that an actor's *apparent* awareness of risk was considered significant to criminal liability at common law. Writing sometime before 1678, Hale illustrated varying degrees of culpability with the following hypotheticals:

A. drives his cart carelessly, and it runs over a child in the street. If A. had seen the child, and yet drives on upon him, it is murder; but if he saw not the child, yet it is manslaughter; but if the child had run cross the way, and the cart run over the child before it was possible for the carter to make a stop, it is *per infortunium*, and accordingly this direction was given by us at Newgate sessions in 1672, and the carter convict of manslaughter.¹¹⁰

Hale's description follows the still predominant use of the three part wilful-careless-faultless scheme. Where the actor drives carelessly and

103. *Id.*

104. *Exodus* 21: 28, 29.

105. Wigmore agrees that there is no notion of negligence in the 1200s and goes on to trace the rise in negligent liability in the 1500s. Wigmore, *supra* note 36, at 442-44.

106. See note 15 & accompanying text *supra*.

107. KENNEY'S OUTLINES OF CRIMINAL LAW 28 (J. Turner ed., 18th ed. 1962) [hereinafter cited as Turner]. Later he adds: "[I]t should now be recognized that at common law there is no criminal liability for harm . . . caused by inadvertence." *Id.* at 38 (emphasis and citation omitted). Professor Turner concludes that criminal liability has three fundamental prerequisites: (1) that the defendant's conduct contributed to the actus reus; (2) that the defendant's conduct was voluntary; and (3) that at the time defendant *foresaw* that the acts or omissions might produce certain consequences. *Id.* at 45.

108. *Id.* at 144, 152.

109. See, e.g., WILLIAMS, *supra* note 8, at 64-66, 115; Turner, *The Mental Element in Crimes at Common Law*, 6 CAMBRIDGE L.J. 31 (1936).

110. 1 HALE, *supra* note 83, at 476.

sees the child, he is treated as acting *wilfully* and guilty of murder. Where the actor drives carelessly and does not see the child, he is guilty of manslaughter. This would seem to be the culpable, *careless*, variety of accident. Hale distinguishes the *faultless* variety of accident, where "the child had run cross the way, and the cart run over the child *before it was possible* for the carter to make a stop." Notice again the "unavoidability" this faultlessness standard requires.

There is no doubt that a form of the legal fiction that persons intend the natural consequences of their acts is in operation here.¹¹¹ Having rejected this maxim, modern descriptions would not invoke a wilfulness label. Consequently, the logical modern terms for the three cases with respect to the death of the child may be as instances of recklessness, negligence, and faultlessness respectively. But this too would be an inaccurate characterization. In practice the determination of whether A. was aware, *i.e.*, whether A. saw the child, was made not according to whether A. in fact saw the child, as Hale's rule would seem to suggest, but according to whether a reasonable person would have seen the child. The use of that objective standard is the same reliance upon objective evidence of a culpable state of mind that is seen in the maxim which presumes intention from "natural consequences." Here, such reliance would create a presumption of awareness from apparent consequences. Thus Hale's *apparent* distinction between recklessness and negligence, between awareness and unawareness, in practice simply marks, in modern terms, two forms of negligence, one perhaps a stronger objective case of fault than the other.

This apparent use of a purely objective standard to presume a subjective state of mind and hence wilful and reckless conduct continued for at least two centuries. During this period, however, the need to show actual knowledge of danger by the defendant, not just knowledge by the reasonable person, was emphasized and the maxim's conclusive presumption became increasingly rebuttable. Thus, in 1803 East used the same presumption of wilful conduct as Hale. In defining murder he said: "Thus, if a person, breaking in an unruly horse, wilfully ride him among a crowd of persons, the probable danger being great and apparent, and death ensue from the viciousness of the animal, it is murder."¹¹² But in stating the principle East added a phrase not seen in the earlier writers he relied upon:

For how can it be supposed that a person wilfully doing an act, so manifestly attended with danger, *especially if he shewed any con-*

111. See, *e.g.*, Turner, *supra* note 107, at 35.

112. 1 EAST, *supra* note 73, at 231.

sciousness of such danger himself, should intend any other than the probable consequence of such an act. But yet if it appear clearly to have been done heedlessly and incautiously only, and not with an intent to do mischief, it is only manslaughter¹¹³

Thus, by the early nineteenth century the presumption of wilfulness would seem to have required a finding of recklessness, *i.e.*, actual awareness of the risk. At the least this was seen as a clearer case for the use of the presumption. Technically, however, the rejection of the wilfulness presumption did not come in England until the Criminal Justice Act of 1967¹¹⁴ specifically overruled it. Despite judicial approval just six years prior to that Act,¹¹⁵ the presumption had fallen into general disrepute by the early nineteenth century.

Predictably, as the movement toward subjective criminality overcame the wilfulness presumption it also tended to weaken the presumption of recklessness. Society came to accept that the reasonable person's awareness of the risk did not necessarily prove the defendant's awareness of the risk and, more importantly, society came to recognize that the distinction between these two cases was a significant one.

Admittedly, distinctions in *degrees* of carelessness were recognized during Hale's time and before. A distinction was made, for example, between cases in which a person, not specifically intending death, stabbed the deceased and cases in which the person only struck a blow with a fist or a small stick. The first was murder, the second was manslaughter.¹¹⁶

There are a number of interpretations of the rationales underlying such a distinction. First, the difference in culpability may be attributed to the difference in *likelihood* of the risk created by the two actions. Second, it may suggest that the *harm* risked was greater. Taken together, one might conclude that a stabbing creates a greater risk of

113. *Id.* (emphasis added). Compare *id.* with 1 HALE, *supra* note 83, at 476; 4 BLACKSTONE, *supra* note 47, at *200; and 1 W. HAWKINS PLEAS OF THE CROWN 74, 86-87 (1716). Hawkins does give the following account: "As to the sixth instance of this kind, viz. Such killing as happens in the execution of an unlawful action, where no mischief was intended at all. It is said, that if a person happen to occasion the death of another, in advisedly doing any idle wanton action, which cannot but be attended with the manifest danger of some other; as by riding with a horse, known to be used to kick, among a multitude of people, by which he means no more than to divert himself by putting them into a fright, he is guilty of murder." *Id.* at 86-87. One might take the language emphasized in the text as implying that in certain instances knowledge of the danger *by the defendant* is in some way significant. Whether this may appropriately be read into the passage is not clear. Blackstone (1765) gives a similarly ambiguous passage. 4 BLACKSTONE, *supra* note 47, at *200.

114. Criminal Justice Act, 1967, Eliz. 2, c.80, § 8, at 1630 (1967).

115. D.P.P. v. Smith, [1961] A.C. 290, 303.

116. 3 STEPHEN, *supra* note 67, at 56.

death than does a blow by a fist or a small stick. The significant point is that under neither interpretation is the distinction in the degrees of carelessness based upon the actor's awareness of the risk created, *i.e.*, the reckless-negligent distinction. That distinction does not concern differences in the extent of the harm risked or the likelihood of the risk; it is concerned instead with awareness of risk.

Nonetheless, logic dictates that the greater the risk created, the more likely an actor is to be aware of it. Thus, another interpretation of these distinctions is that they separate cases in which there is sufficient evidence of an actor's awareness of risk from cases where there is not. One could point to the continuous existence of such distinctions in the common law tradition as evidence of the common law recognition of the reckless-negligent distinction,¹¹⁷ but the theory cannot be sustained. Their existence is simply another application of the presumption of recklessness. When objective facts such as an actor's conduct are used as conclusive evidence of awareness or lack of awareness, the standard applied is necessarily an objective one. Using only such facts does not disclose whether *this* actor was *in fact* aware or unaware, but rather *whether the reasonable or ordinary person in this actor's situation* would have been aware or unaware, and this of course is the negligence standard. The point is that to adopt the subjective-objective test of the recklessness-negligence distinction, the inquiry must go beyond the *apparent* state of mind of the actor. The concern must be with actual state of mind, which may differ from apparent state of mind.

The reform movement of the late eighteenth century, known best for its opposition to the death penalty,¹¹⁸ did much to foster the recognition of the reckless-negligent distinction as used today.¹¹⁹ More importantly, after noting the significance of the distinction, reformers argued that the distinction should mark the boundary of criminal liability, that negligence should be excluded from liability. The first clear official statement of this proposition came from the Royal Commission created by Parliament to consider further the proposals generated by the reform movement. In its Fourth Report (1839) the Commission urged:

And so in all cases it is essential to the criminality of the act, both in law and morals, not only that the act should in its own nature under

117. Of course, it still would not support the claim by Hall, Turner, and others that only recklessness was a basis for criminal liability and that negligence was exculpated, as even under this theory negligence is only a mitigating factor.

118. I L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 at 399-424 (1948).

119. See *id.* at 374 (discussing Bentham's position).

the circumstances be attended with peril to life, but that the offender should be aware of such peril. Where the offender does an act attended with manifest danger to life wilfully, that is with knowledge of the consequences, he may properly be said to have the "*mens mala*, or heart bent upon mischief"; but if he does an act, however dangerous it be in its own nature, without any knowledge or suspicion of its tendency, that is, if he does not wilfully place life in peril, he cannot be said to show *mens mala* or heart bent on mischief.¹²⁰

Here then, in 1839, is the birth of Turner's and Hall's "traditional common law rule"¹²¹ requiring actual awareness for criminal liability.

Indeed, the proposed rule was *not* adopted. Not only was negligence still permitted as the basis for criminal liability, but the significance of the distinction between recklessness and negligence was still commonly rejected altogether. For example, the Draft Code of the Criminal Code Commission of 1878-1879, in defining homicide, accepted the distinction in places, but continued to reject it in others, as its description of one category of murder illustrates: "If the offender, for any unlawful object, does an act which *he knows or ought to have known to be likely to cause death*, and thereby kills any person, though he may have desired that his object should be effected without hurting any one."¹²² This of course is the felony-murder doctrine. It is an obvious example of a common law doctrine, continuing from the earliest time, which ignored an actor's unawareness of risk-taking and imposed liability for negligence as if the conduct were knowing.

As late as the late nineteenth century the distinction was still commonly ignored. Stephen described the law of homicide in 1883: "Unlawful homicide" was viewed as (1) "the result of unjustifiable, inexcusable, intentional violence,"¹²³ or (2) "the result of carelessness in doing an act lawful or unlawful," or "the unintentional result of an unlawful act."¹²⁴ "Not unlawful homicide" *i.e.*, noncriminal, was "the result of doing a lawful act with proper care."¹²⁵ The same apparent intentional-careless-faultless distinction appears in the scheme as it was first used ten centuries before. There is no discussion of the defendant's awareness of the risk. The "carelessness" and "unlawful act" situations represent the same two forms of culpable accident seen in Bracton: an

120. FOURTH REPORT OF HER MAJESTY'S COMMISSION ON CRIMINAL LAW XIX-245 at xxi (1839), cited in Turner, *supra* note 107, at 29.

121. See note 14 & accompanying text *supra*.

122. CRIMINAL CODE COMMISSION OF 1878-79, DRAFT PENAL CODE § 174(d), cited in 3 STEPHEN, *supra* note 67, at 80 (emphasis added).

123. 3 STEPHEN, *supra* note 67, at 21.

124. *Id.* He also includes here "an omission to perform a legal duty."

125. *Id.* at 19.

accident resulting from an unlawful act and an accident resulting from lack of due care whether the act is lawful or unlawful. The "unlawful act" doctrine, which continues today, is essentially a form of presumed carelessness.¹²⁶ Stephen equates "unintentionally" and "accidentally";¹²⁷ thus, both entries are forms of culpable accidents.

History, then, reveals the weakness of Hall's and Turner's argument against negligent liability, in which they cite the "common law principle" requiring foresight of consequences¹²⁸ or awareness of risk-taking. Possibly these writers mean "common law" only to refer to a system of judge-made laws, of whatever date. The passages strongly suggest, however, that they intend "common law" to imply that the principle was a historical one from the common law period. Indeed, this is the primary and explicit thrust of their argument: because the principle had historical prominence, its opponents must carry the bur-

126. The underlying rationale of the unlawful act doctrine may be described as carelessness irrebuttably presumed from the unlawfulness of the act; that is, a person should foresee, or at least be held accountable as if he or she had foreseen, that an unlawful act may cause a death. It is not an accurate presumption. The most prudent bank robber may not foresee and take the steps to avoid causing a purely accidental death. In support of this interpretation of the underlying rationale of the rule, see the Model Penal Code's formulation of a substitute for the felony murder rule. MODEL PENAL CODE § 210.2(1)(b) (Proposed Official Draft, 1962). Recklessness and indifference are presumed if the actor is engaged in certain felonies. See MODEL PENAL CODE § 201.2, Comment 4 (Tent. Draft No. 9, 1959).

127. 3 STEPHEN, *supra* note 67, at 16.

128. If the debate over negligence as a basis for criminal liability were limited to cases of unforeseen harmful consequences, it would concern a relatively small part of the criminal law. There are few offenses which include a result (or consequence) element. Under the offense definition scheme of the Model Penal Code there are three types of elements of an offense: conduct, circumstance, and result. See MODEL PENAL CODE § 2.02 (Proposed Official Draft, 1962). All offenses must have a conduct element, see *id.* § 2.01(1), but neither a circumstance nor a result element is required. Offenses defined to include one conduct element and one or more circumstance elements are most common. Generally, the only offenses including a result element are the personal injury offenses, which are distinguished from each other according to the result element (the extent of the injury), the property destruction offenses (but not the theft offenses), and certain other miscellaneous offenses. For example, some formulations of the false imprisonment offense require not only that the actor unlawfully restrained another (conduct), but that the restraint was such as to "interfere substantially with his liberty" (result). *Id.* § 212.3. This result element is a qualification of the general prohibition against unlawful restraint which is neither necessary to the definition of the offense nor universally accepted. The debate over the importance of foresight is not limited to these result offenses, however. See notes 14, 18 & accompanying text *supra*. The arguments for and against requiring foresight of a resulting consequence are equally applicable to foresight as to the existence of a circumstance required by the offense. In examining the common law role of foresight, not only must instances where a defendant does not foresee a required harm be considered, as in negligent homicide, but also instances where he or she is unaware of required circumstances. The latter situation commonly arises under the heading of an honest but unreasonable mistake.

den of justifying the abandonment of such tradition.¹²⁹ But a principle, no matter how meritorious, urged by a reform commission in 1839, does not establish a "common law tradition."¹³⁰

Moreover, historical evidence suggests that courts were *unable* to undertake this subjective inquiry until relatively recently. Most early judges and commentators viewed the determination of a subjective mental element, such as foresight, as beyond the power of juries. In 1477, England's Chief Justice Brian expressed this belief: "The thought of man shall not be tried, for the devil himself knoweth not the thought of man."¹³¹ Hale, denouncing prosecution for witchcraft in his *Historia Placitorum Coronae*, explained: "[I]t cannot come under the judgment of felony, because no external act of violence was offered whereof the common law can take notice, and secret things belong to God."¹³² Such a view, although weakening, continued through the nineteenth century. At the turn of that century, one English justice was obliged to chasten: "So far from saying you cannot look into a man's mind, you

129. See text accompanying note 15 *supra*.

130. Not only is there no historical support for the notion that foresight or awareness was required for criminal liability at common law, but the notion on its face seems contrary to many truly ancient principles that no one disputes. For example, consider the arguments of one who would oppose negligent liability: First, foresight of the consequences or awareness of the circumstances of one's conduct is critically important because only in the presence of such foresight can the threat of criminal sanction effectively deter an actor. Second, only when an actor is aware that he or she is or may be violating the prohibition of the criminal law can he or she be held blameworthy. Both arguments rest upon the assumption that if an actor foresees the consequences (or is aware of the circumstances) of conduct, he or she then will foresee also that conduct violates the criminal law. In other words, the arguments against criminal liability in the absence of foresight of consequences or awareness of circumstances are equally applicable in any case in which the actor does not foresee that conduct may result in criminal liability, no matter whether this lack of foresight of liability is the result of lack of foresight of the consequences that make the conduct criminal, lack of awareness of the circumstances that make the conduct criminal, or any other lack of foresight. If an actor, for any reason, does not foresee that conduct may result in criminal liability, the threat of imposition of criminal liability will not deter that conduct, nor will the conduct indicate the willingness to violate society's prohibitions as set out in the criminal law, such willingness providing the moral basis for criminal conviction and just punishment. Thus, the logic of the arguments requiring foresight of consequences or awareness of circumstances necessarily leads to requiring foresight of criminal liability. Yet such a principle was and still is squarely rejected by the common law. Instead, the common law adopted such maxims as "ignorance of the law is no excuse" and "all men are presumed to know the law." Thus while it is declared that the common law required mens rea, and mens rea, we are told, means recklessness or more, Turner, *supra* note 107, at 34, logical reasoning tells us that this is not entirely true and, from the first, is suspect.

131. Y.B. Pasch. 7 Edw. 4, f.2, cited in 2 POLLOCK & MAITLAND, *supra* note 45, at 474-75.

132. HALE, *supra* note 83, at 429.

must look into it"¹³³

Even if it were agreed that an actor's subjective mental state was discoverable through circumstantial evidence, such factors in practice *could not* have been considered directly in determining criminal liability until relatively recently. The rules of evidence effectively barred the introduction of the evidence beyond objective facts most relevant to the subjective inquiry of state of mind. Most devastating to this inquiry was the rule which prohibited defendants from testifying in their own behalf,¹³⁴ on the ground that they were incompetent as witnesses because of their interest in the case. At first, a defendant was not even permitted to present any witnesses. This rule later was altered to allow defense witnesses to testify, although not under oath, and thus with less weight than the Crown's witnesses.¹³⁵ Ultimately, the rule was liberalized to permit defense witnesses under oath in all cases.¹³⁶ The rule disqualifying defendants was repealed in 1853,¹³⁷ but defendants were not permitted to testify under oath until 1898.¹³⁸ Thus, until the early twentieth century no such inquiry into the actor's actual state of mind was or could have been undertaken effectively. This confirms the doctrinal historical evidence that until that time the reckless-negligent distinction was not implemented.¹³⁹

The history of this development is closely tied to the gradual suspicion of purely objective proof of criminality, particularly the maxim that all persons are presumed to intend the natural consequences of their acts. This was the general catch-phrase which originally foreclosed, and later disrupted, the independent inquiry into an actor's actual state of mind. Although the maxim generally is rejected today, in

133. *Angus v. Clifford*, [1891] 2 Ch. 449, 471.

134. 1 STEPHEN, *supra* note 67, at 439-40.

135. 4 BLACKSTONE, *supra* note 47, at *359-60.

136. *Id.* at *360 (citing 1 Ann. St. 2, c.9).

137. 16 & 17 Vict. c. 83, *cited in* 1 STEPHEN, *supra* note 67, at 440.

138. See G. WILLIAMS, *THE PROOF OF GUILT* 45-48 (2d ed. 1958).

139. Holdsworth appropriately warns that one should not confuse the nature of the inquiry with the standard. 3 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 375 (3d ed. 1923). This is generally true, but the nature of the reckless-negligent distinction is such that the inquiry necessarily affects the standard applied: evidence of purely objective facts cannot satisfy a subjective standard. To meet such a standard, the inquiry must include evidence which more directly concerns the actor's subjective state of mind. Arguably all "evidence" by its nature is objective. But different sorts of objective evidence inquire into subjective issues with different degrees of directness. We may inquire only into an actor's conduct, or we may ask others what the actor said concerning his or her state of mind at the time of the conduct, or at the time of trial we may ask the defendant directly about his or her state of mind at the time of the conduct. Only the latter sort of inquiry is persuasive evidence that the law is indeed concerned with actual, not just apparent, awareness.

many instances inquiry into the subjective state continues to be ignored.¹⁴⁰ The objective-subjective proof of criminality dispute is but one example, albeit an important one, of how distinctions in culpability, once recognized, only slowly gain acceptance in other contexts.

Purposeful versus Knowing

Unlike the controversy concerning the reckless-negligent distinction, there is little dispute that the purposeful-knowing distinction is of fairly recent vintage.¹⁴¹ There are hints of its existence at the beginning of the nineteenth century,¹⁴² but it was not explicitly recognized until 1837 when Macaulay, in the *Indian Penal Code, Notes*, explained:

In general we have made no distinction between cases in which a man causes an effect designedly, and cases in which he causes it with a knowledge that he is likely to cause it. If, for example, he sets fire to a house in a town at night, with no other object than that of facilitating a theft, but being perfectly aware that he is likely to cause people to be burned in their beds, and thus causes the loss of life, we punish him as a murderer.¹⁴³

Stephen (1883) also noted but rejected the distinction. For example, in describing alternative forms of malice aforethought he listed:

An *intention* to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not.

... *Knowledge* that the act or omission which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.¹⁴⁴

140. The United States Supreme Court has found it necessary in two recent cases to condemn specifically the continuing use of this maxim as a substitute for a finding of a specific subjective state of mind of the defendant. See *Sandstrom v. Montana*, 99 S. Ct. 2450 (1979); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978).

141. See, e.g., W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 197-98 (1972).

142. 1 EAST, *supra* note 73, at 225-26.

143. T. MACAULAY, J. MACLEOD, G. ANDERSON & F. MILLETT, *INDIAN PENAL CODE, NOTES* 17 (1837). Macaulay goes on to note that a distinction is made between conduct by which one intends to cause death and conduct by which one knows of a strong likelihood of death where, in the latter case, the high risk of death is the victim's only chance of surviving, as when a surgeon performs a risky, but necessary, operation. Today these cases probably would be distinguished as forms of a justification defense.

The purposeful-knowing distinction is recognized but rejected in defining a wide variety of specific offenses of the Indian Penal Code. See, e.g., *id.* §§ 218, 238, 239, 243, 261, 316, 341, 356-57, 407-15.

144. 3 STEPHEN, *supra* note 67, at 22 (emphasis added). Two other forms of malice aforethought are "an intent to commit any felony whatever" and "an intent to oppose by force any officer of justice in arresting or keeping in custody a person whom he has a right to arrest or keep in custody, or in keeping the peace." *Id.* But in 1896, Wharton, in describing

The Draft Code of the Criminal Code Commission of 1878-79 also acknowledged but rejected the significance of the distinction.¹⁴⁵

As previously discussed, a distinction commonly is implemented first through the exercise of discretion at the time of sentencing. Thus, not surprisingly, Stephen appears to have rejected the significance of the distinction in the substantive law, but used it in deciding which cases were not suitable for the death penalty.¹⁴⁶ Finally, in 1962, the Model Penal Code firmly established the distinction as a common feature of culpability schemes in the United States.¹⁴⁷ Even today, however, some commentators apparently would not formally implement the distinction.¹⁴⁸ Professor Williams criticizes the Model Penal Code's use of the distinction because knowingly causing a harm, he believes, should be treated as no less culpable than purposely causing it.¹⁴⁹ The Model Penal Code, however, generally does treat the two the same by requiring only knowledge as to a harmful result.¹⁵⁰ The requirement of purpose as to a result under the Code is a category of specially increased culpability applicable to only a few offenses. As it happens, these offenses, including burglary, attempt, forgery, libel, obscenity, theft, conspiracy, and treason,¹⁵¹ are just the offenses which Williams identifies as requiring intention and a special motive, or "specific intent."¹⁵² Where there are differences between Williams and the Code, they can be attributed to policy disputes, as in the case of complicity by

murder, did not, as Stephen did, note the distinction. 1 WHARTON, A TREATISE ON THE CRIMINAL LAW 329 (10th ed. 1896). Stephen consistently rejected the significance of the distinction. 3 STEPHEN, *supra* note 67, at 56. See J. STEPHEN, A DIGEST OF THE CRIMINAL LAW art. 264, at 211-16 (9th ed. 1950), cited as art. 228 in 3 STEPHEN, *supra* note 67, at 80. But see 3 STEPHEN, *supra* note 67, at 85 (distinction is relevant to imposition of the death penalty).

145. See text accompanying note 122 *supra*.

146. Stephen would not execute those offenders in cases where there was "the absence of a positive intention to kill . . ." 3 STEPHEN, *supra* note 67, at 85. The Model Penal Code also would distinguish purposeful and knowing homicides, not in substantive liability but in the context of sentencing. MODEL PENAL CODE § 2.02, Comment 3 (Tent. Draft No. 4, 1955) (although not explicitly noted as a mitigating factor).

147. See notes 18-20 & accompanying text *supra*.

148. For example, Professor Williams defines "intention" to include both. He speaks of "[i]ntention as desire of consequence," the Model Penal Code "purpose." WILLIAMS, *supra* note 8, at 34-36. He also notes that "intention also includes foresight of certainty," the Model Penal Code definition of "knowing." *Id.* at 38-42.

149. Williams, *The Mental Element in Crime*, 27 REVISTA JURIDICA DE PUERTO RICO 193, 196-97 (1957-58).

150. See MODEL PENAL CODE § 2.02, Comment 3 (Tent. Draft No. 4, 1955).

151. See MODEL PENAL CODE §§ 221.1(1), 223.2, 224.1(1), 242.1, 501(1)(b), 503.1 (Proposed Official Draft, 1962).

152. WILLIAMS, *supra* note 8, at 48-52.

principals.¹⁵³ Thus in most instances Williams would agree with the Model Penal Code requirement of purpose as to result, but would say that a "specific intent" to cause the result is required.¹⁵⁴

One may speculate as to why the distinction was not recognized earlier. Until well after Bentham's reform movement the death penalty commonly was imposed for most forms of serious felonies.¹⁵⁵ Since the greatest number of distinctions in culpability generally were applied to serious felonies, there was little reason to consider refinements at the higher end of the culpability spectrum when the same punishment was imposed throughout the spectrum. When murder and manslaughter both were punished by death despite the presence of the admittedly significant intentional-careless distinction,¹⁵⁶ the introduction of another distinction would seem pointless.

Further, given the history of the reckless-negligent distinction, it should be no surprise that the development of the purposeful-knowing distinction would come only after recklessness and negligence were distinguished. The maxim that "all persons are presumed to intend the natural consequences of their acts" affected both distinctions. In an 1811 case, for example, the court presumed a specific purpose through the use of the maxim: "In an indictment for burning a mill *with intent to injure the possessors* it is enough to prove the intentional burning, for in such a case the accused 'necessarily intends that which must be the consequence of the act.'"¹⁵⁷ Recall Hale's presumption of a wilful killing where the cart driver saw, or apparently saw, the child in the road.¹⁵⁸ This presumption of intentional killing based on *recklessness or negligence* seemingly would be rejected before the presumption would weaken in the above case, where an intentional (purposeful) injury is presumed from what is at least an apparent *knowledge* that in-

153. See, e.g., *id.* at 366-80, 394-96.

154. In addition to the disagreements noted above concerning Williams, the purposeful-knowing distinction is at the basis of a number of other conflicts. The best known example is the dispute as to sufficiency of knowing rather than purposeful assistance in complicity. Compare *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938) with *Backun v. United States*, 112 F.2d 635 (4th Cir. 1940), discussed in Model Penal Code § 2.06(3)(b) Comment (Tent. Draft No. 1, 1953).

155. Many people dispute the fact that the death penalty was imposed in practice as often as the statutes would seem to require. See, e.g., Greene, *Societal Concepts of Criminal Liability for Homicide in Medieval England*, 47 SPECULUM 669 (1972).

156. All homicides not justified or excused (self defense or negligence) were punished by death. This was the case until the 1500s. See 3 STEPHEN, *supra* note 67, at 44-45.

157. *Rex v. Farrington*, 168 Eng. Rep. 763 (1811) (emphasis added). See also *Rex v. Sheppard*, 168 Eng. Rep. 742 (1810), cited in WILLIAMS, *supra* note 8, at 39.

158. See text accompanying note 110 *supra*.

jury would result. The latter distinction is finer and more sophisticated, involving only a slight distance on the culpability spectrum.

Limitations of the Historical Evidence

A note of caution should be offered about the "history" presented here. The history is in the classical style or as the legal realists would say, in the "pre-realistic" style. It is a history of the substantive law, not of the actual effects of the law based upon actual experience. It explains only what should have happened, according to the law in books.

Further, it does not seek to give reasons for the state of the law in books. Many future writers may seek to explain criminal law doctrines by reference to the social, political, and cultural context in which they developed. No doubt these factors played an important role in the nature of the criminal law throughout time, at least with respect to many important details. One might speculate, however, that the most significant determinant of the criminal law and its development is the intuitive culpability judgment which all human beings possess. That judgment may become more developed in an enlightened society, but it is not so fickle as to be a product of the current social context. Rather, it is a major contributor to that social context, manifested in the criminal law as well as other social institutions.¹⁵⁹

This view of the intuitive nature of criminal law development, and the recognition of distinctions in criminal culpability in particular, gains some support from recognition of most of the distinctions adopted today by many different societies. The early distinctions, in particular, appear in even primitive cultures. For example, the Ashanti people of the Gold Coast of West Africa, like nearly all primitive peoples, distinguished at least between wilful and accidental conduct.¹⁶⁰

159. The history of the recognition of culpable states of mind is a prime example of this intuitive judgment at work. It is not that the intuitive sense of justice of the medieval person was different from ours, but rather than it was not and could not be as fully expressed. Our "more advanced development" was made possible only because medieval advances over predecessors gave us the opportunity to add our own additional bit of sophistication. The process of development in criminal law, as in other fields, is one in which progress depends upon the contributions of each successive generation.

160. E. HOEBEL, *THE LAW OF PRIMITIVE MAN* 235-36 (1954). See also P. RODIN, *THE WORLD OF THE PRIMITIVE MAN* 248-51 (1960) (Bantu tribe).

Hartland has noted, as Brunner did, see notes 35-37 & accompanying text *supra*, that even this fundamental distinction is an evolutionary step forward from a position of criminal liability without regard to culpable state of mind. He gives examples of this period in primitive cultures which then parallel the early Germanic tribes noted by Brunner. See E. HARTLAND, *PRIMITIVE LAW* 58, 147-48 (1924).

Many other cultures have gone further and adopted a wilful-careless-faultless culpability structure. The Bantu tribe of South Africa in pre-European times used such a structure and excused faultless harms or at least significantly reduced the resulting penalty.¹⁶¹ The Jalé people of western New Guinea recognized these fundamental distinctions not in formal substantive law distinctions, but through informal procedural devices.¹⁶² Recall that informal use was a typical prelude to substantive law adoption of distinctions in our own common law history.¹⁶³ Indeed, many aspects of the culpability systems of primitive peoples mirror those of the early periods in the common law tradition. For example, it is common to see the use of the presumption that a person intends the results that follow from an act,¹⁶⁴ a single system of (or preliminary separation of) crime and tort, and the use of authorized private revenge rather than central government enforcement.¹⁶⁵

More accurately, then, the history of the recognition of culpable states of mind should be viewed as a continuing process of self-civilization. A search for explanations of substantive criminal law developments as products of particular social or political climates inevitably would be fruitless.

Conclusions and Speculations

This review of the history gives some general sense of the development of distinctions in culpable states of mind. The most significant general observation is that the process of recognizing additional distinctions has been through the recognition of additional bases for mitigation. The new distinction creates a new category that will receive less harsh punishment, or limits a more harsh punishment to the old category.

This trend may not continue, however. Its existence simply may be the result of the severity of the law's starting point in punishing those with little or no personal culpability. Once mitigating categories are added, to the point of recognizing that one may faultlessly cause a harm, the movement may be towards increased sophistication in both

161. I R. PIDDINGTON, AN INTRODUCTION TO SOCIAL ANTHROPOLOGY 345, 349 (2d ed. 1958).

162. HORIZONS ON ANTHROPOLOGY 316 (S. Tax & L. Freeman eds., 2d ed. 1977).

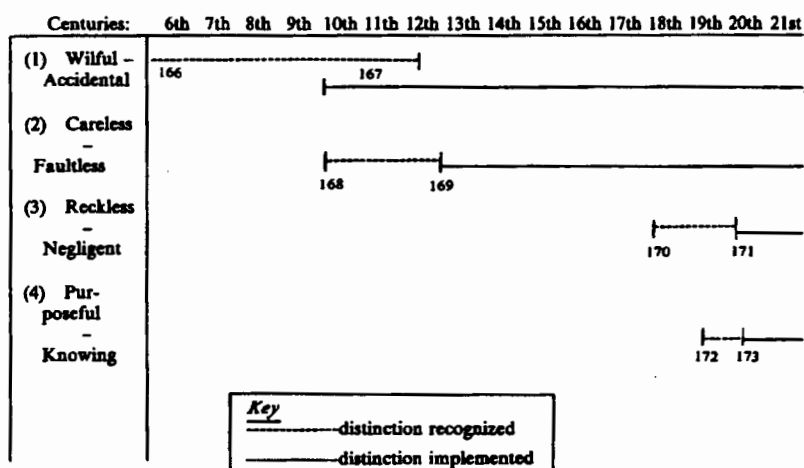
163. See notes 30-31 & accompanying text *supra*.

164. I R. PIDDINGTON, AN INTRODUCTION TO SOCIAL ANTHROPOLOGY 349 (2d ed. 1958).

165. See, e.g., *id.* (Bantu tribe); HORIZONS ON ANTHROPOLOGY 316 (S. Tax & L. Freeman eds., 2d ed. 1977) (Jalé people).

directions: the most recent, purposeful-knowing distinction appears to be the exception to the general mitigation trend. In that case the more culpable category, purposeful, is viewed as a needed deviation from the norm; this more culpable state of mind is clearly the less commonly used.

The relative timing of the recognition and initial implementation of the distinctions can be depicted graphically, as follows:



166. It is disputed whether there was ever a period when wilful conduct or consequences were not distinguished from accidental. See notes 34-43 & accompanying text *supra*.

167. The wilful-accidental distinction may have gone unimplemented until the tenth century and as late as the thirteenth century still may have been used only infrequently. See notes 44-84 & accompanying text *supra*.

168. The period in which the primary distinctions are wilful, careless, and faultless begins early, at least by 871-901, as seen in the *Laws of Alfred*. See notes 85-100 & accompanying text *supra*.

169. Bracton (1256) gives the first real evidence of use of the careless-faultless distinction, but it seems likely that it was implemented sometime before then. See notes 85-100 & accompanying text *supra*.

170. Hale (1678) offers the first reliable example of the law's acknowledgement of the distinction between recklessness and negligence. See notes 101-40 & accompanying text *supra*.

171. The reckless-negligent distinction remained unimplemented until the nineteenth century. See notes 101-40 & accompanying text *supra*.

Perhaps the most apparent conclusion from this graphic comparison is that the wilful-accidental and careless-faultless distinctions are ancient and the reckless-negligent and purposeful-knowing distinctions both are comparatively modern. This of course contradicts the view that the reckless-negligent distinction was the traditional common law boundary for imposition of criminal liability. During the common law period the true reckless-negligent distinction was not generally recognized, let alone implemented, and certainly was not implemented to an extent justifying status as a rule of common law. Further, the history shows that even the faultless category, at first unrecognized, served in many important instances only to mitigate, a situation which has continued to the present.

Another notable feature is the significantly reduced lead time, from recognition to implementation, of the more modern distinctions. The period between initial, informal implementation and formal adoption by substantive criminal law is also shorter in the development of the modern distinctions. These trends can be explained largely by the greater power of government. As has been observed, "only when obedience to the law became the rule was it possible to make exceptions."¹⁷⁴ Thus, the implementation of a distinction which provided further mitigation had to await the authority of the government and the acceptance of the people. With the increased sensitivity to the need for well-constructed, responsive, criminal codes, and with the advent of criminal law revision commissions to accomplish this task, this "lead time" likely will be reduced still further.

One final observation which the historical evidence might suggest is that the earlier the recognition of a distinction, the more universal and complete has been its implementation and acceptance. Later distinctions have been implemented sparingly and even then not without dispute. These limitations and disputes might be seen as a normal stage in the developmental process, that is, the earlier distinctions may have at the same stage gone through a similar period of limitations and disputes. On the other hand, this difference might be interpreted as an

172. The purposeful-knowing distinction is of recent origin, appearing only in the nineteenth century. See notes 142-57 & accompanying text *supra*.

173. It was not until the twentieth century that the distinction between purposeful and knowing was given a practical import. See notes 142-57 & accompanying text *supra*.

174. Parker, *The Evolution of Criminal Responsibility*, 9 ALBERTA L. REV. 72 & n.153 (1971) (citing Brown, *The Emergence of the Psychical Test of Guilt in Homicide 1200-1550*, 1 TAS. U.L. REV. 231 (1959)).

indication that the earlier distinctions are more fundamental, basic notions of blameworthiness. One implication may be that the later distinctions will never share the same level of acceptance as the earlier ones. Nonetheless there may well be a continuing trend toward greater application of all the distinctions. While all four distinctions may be recognized now only in homicide cases, they may spread to other serious offenses as well. Both views may be accepted, however, as they are not inconsistent. The earlier distinctions may be more fundamental; and the later may never share the same level of acceptance as the earlier ones, at least at the same time. Nonetheless, they may gain the status of fundamental in their own time.

The long-range view of history illustrates the irresistible momentum of development. Any prediction of course is entirely speculative, but mere logic compels the conclusion that no matter how stable or advanced we may now feel, we are only part of someone else's history. One should not rule out the possibility that in half the time from Bracton to today, we will seem twice as clumsy in our use of culpability distinctions as Bracton seems to us. A later generation may perceive additional fundamental distinctions in culpability and provide greater application of current ones. No doubt the law should not and will not use distinctions beyond those that the society considers significant. But, as the people of 844 recognized only two, the people of 2548 may feel justice cannot be done with less than eight.